86-609

No.

Supreme Court, U.S.
FILED
OCT 14 1986
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCAL UNION NO. 238,
Petitioner,

v.

CRST, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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October 14, 1986

QUESTION PRESENTED

Whether respondent is required to submit a discharge grievance to binding arbitration pursuant to the grievance procedures of an expired collective bargaining agreement.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Chauffeurs, Teamsters and Helpers, Local 238 [Union], petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Eighth Circuit entered in this case on July 16, 1986.

OPINIONS BELOW

The order and judgment of the United States District Court for the Southern District of Iowa (App. A, B) are not officially reported. Jurisdiction of the District Court

was conferred by 29 U.S.C. §185(a). The panel opinion and judgment of the Court of Appeals, reported at 780 F.2d 379 (8th Cir. 1986), and en banc opinion and judgment, which is officially unreported at this time, are set forth in Appendices C, D, and E.

JURISDICTION

Jurisdiction of this Court to review, by writ of certiorari, the judgment and decision of the United States Court of Appeals for the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner, Chauffeurs, Teamsters and Helpers, Local 238 [Union], a labor organization, represents certain employees of respondent, CRST, Inc. [Employer], a trucking firm, for purposes of collective bargaining pursuant to the provisions of the National Labor Relations Act.

On June 30, 1982, a collective bargaining agreement between the parties covering the over-the-road employees at Cedar Rapids, Iowa, expired. The parties were unable to reach an agreement on a successor agreement and on December 27, 1982, the Employer placed in effect wages, hours and other working conditions consistent with its final offer made to the Union. These provisions were forwarded to the Union and also posted on the Employer's premises in Cedar Rapids, Iowa.

In July, 1983, employee Jerry Ottoway, was terminated following an accident for which the Employer determined he was responsible. Mr. Ottoway claimed to have been discharged without just cause and filed a grievance with the Union. The Union pursued the matter according to proce-

dures prescribed in the expired agreement. The Employer refused to arbitrate the grievance asserting there was no agreement in effect between the parties containing such a requirement.

The Union filed suit in the United States District Court for the Northern District of Iowa seeking an order compelling the Employer to submit the grievance to arbitration. The Employer moved for Summary Judgment claiming no agreement between the parties requiring arbitration subsequent to the contract termination in July, 1982. The Union resisted claiming the unilateral schedule implemented by the Employer in December, 1982, referred to resolution of seniority disputes through "the grievance procedure" and that without such a procedure, the language would be superfluous and also that the unilateral schedule was consistent with the Employer's final offer and that a grievance procedure had been a part of this last offer.

On January 31, 1985, the District Court granted the Employer's Motion for Summary Judgment. The Court held, even if defendant's schedule is considered a contract, it does not provide procedures for grieving an employee discharge. The only grievable matters, under the schedule, are seniority dates and positions on the seniority list. Plaintiff was clearly attempting to grieve Ottoway's discharge, not his seniority date or position on the seniority list.

A panel of the United States Court of Appeals for the Eighth Circuit reversed holding the Employer to a duty to arbitrate Ottoway's grievance due in part to the ambiguous nature of its final offer and the reference therein to a grievance procedure and concluding that ambiguous terms should be construed against the drafter. The Court also

concluded that this decision did not interfere with the Employer's right to act unilaterally after bargaining to impasse. (App. C, p. 1).

The circuit court granted the Employer's request for hearing en banc and thereafter affirmed the decision of the District Court concluding that the grievance did not arise under the expired agreement or occur within a reasonable time after its termination and that the Employer's unilateral schedule did not allow for grievance procedures except in limited circumstances not applicable to the case. (App. D., p. A-22)

REASON FOR GRANTING THE WRIT

The Decision of the Eighth Circuit Court Respecting CRST's Obligation to Arbitrate Is Not In Accord With Applicable Decision of This Court.

ARGUMENT

Federal Labor policy favors arbitration as the method of resolving disputes related to collective bargaining agreements and there is a presumption that parties intend arbitration provisions to survive the expiration of agreements as to disputes which arise under a contract. *Nolde Brothers, Inc. v. Local 358, Bakery and Confectionery Workers Union, AFL-CIO,* 430 U.S. 243, 250 (1977). The Supreme Court further observed therein that:

> "In the absence of some contrary indication, there are strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract . . . while the termination of the collective bargaining agreement works an obvious change in the relation-

> ship between employer and union it would have little impact on many of the considerations behind their decision to resolve their contractual difference through arbitration."

Nolde, supra at 253-254. The dispute involved herein whether an employee may be discharged without "just cause," raises a question on a continuing right vested under the contract as was the right to severance pay involved in *Nolde.* The majority decision of the Circuit Court, which did not require arbitration on this dispute, however, relegates all employees upon termination of the collective bargaining agreement to a status of mere employment-at-will. This is clearly contrary to the Court's finding in *Nolde.*

Although it is clear that once impasse in negotiations has been reached, an employer has the right to unilaterally institute terms and conditions of employment and in doing so is not bound to those contained in the expired agreement. Courts have also recognized that an employer may act unilaterally after impasse only if its action is reasonably comprehended within its pre-impasse bargaining proposals. *United Steelworkers of America, AFL-CIO v. Fort Pitt Steel Casting Division-Conval-Penn, Inc.*, 635 F.2d 1071, 1078 (3rd Cir. 1980); *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949). The unilateral schedule implemented by CRST, Inc. made reference to "the grievance procedure" which clearly indicates that it intended to retain a grievance procedure in its continuing relationship with the Union and the employees. The schedule nowhere *expressly rejected* the use of grievance procedures for issues other than seniority. As was persuasive and controlling in *Nolde, supra,* the parties' failure to exclude from arbitrability contracted disputes arising after termination, far from manifesting an intent to have arbi-

tration obligations cease with the agreement, affords a basis for concluding they intended to arbitrate all grievances arising out of the contractual relationship. *Nolde*, 430 U.S. at 255.

CRST additionally created a duty to submit disputes arising regarding terms and conditions of employment to a grievance procedure, by its representation implementing working conditions consistent with its final offer to the Union. This conclusion was supported by the Employer's failure to expressly exclude from the scope of "the grievance procedure" contained in its unilaterally implemented agreement, *all issues except seniority*. This conclusion is reinforced by the Supreme Court's observation:

> "[t]he contracting party's confidence in the arbitration process and an arbitrator's presumed special competence in matters concerning bargaining agreements does not terminate with the contract nor would their interest in obtaining a prompt and inexpensive resolution of their disputes by an expert tribunal. Hence, there is little reason to construe this contract to mean that the parties intended their contractual duty to submit grievances and claims arising under the contract to terminate immediately on the termination of the contract; the alternative remedy of a lawsuit is the very remedy the arbitration clause was designed to avoid."

Nolde, 430 U.S. at 254.

The majority opinion of the Eighth Circuit Court of Appeals reached a conclusion that *Nolde* was inapplicable by adopting the theory which was advocated by two dissenters in *Nolde* and rejected by the majority of the Supreme Court. The dissenters in *Nolde* argued that:

> "The right in dispute, though claimed to arise under the contract, ripened only after the contract had expired and the employment relationship had terminated."

430 U.S. at 258. The majority opinion in *Nolde*, however, stated:

> "However, it is clear that, whatever the outcome, the resolution of that claim hinges on the interpretation ultimately given the contract clause providing for severance pay. The dispute, therefore, although arising after the expiration of the collective bargaining contract, clearly arises under the contract."

Id. at 249. The question of whether the employee herein was wrongfully discharged in violation of the terms of a collective bargaining agreement which had expired clearly hinges on the interpretation ultimately given the contract clause dealing with discharge without cause and, therefore, clearly falls within the rationale as set forth in *Nolde*. The Eighth Circuit Court should have applied the *Nolde* presumption and once this was done it would have become apparent that the employer did not meet its obligation to make clear that post-expiration grievances were no longer arbitrable. The Supreme Court's opinion in *Nolde* would require a result different from that reached by a majority of the Eighth Circuit Court of Appeals. As the Supreme Court stated:

> "The parties must be deemed to have been conscious of this policy [of favoring arbitration of labor disputes] when they agree to resolve their contractual differences through arbitration. Consequently, the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to

> have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship. In short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication."

430 U.S. at 255.

The majority's opinion is not only contrary to *Nolde* but allows the Employer to be deceptive in its employment policies and skews this nation's labor law policy of allowing the parties to settle their differences on the economic battlefield after their respective positions have been made clear.

This Court must review the decision of the Eighth Circuit herein in light of its own precedent as set forth in *Nolde* and the general principles of labor policy present in this country.

CONCLUSION

Petitioner does not seek to rewrite or redraft the provisions of labor law concerning collective bargaining, impasse and duties to arbitrate by pursuing this matter to the Supreme Court. The Supreme Court has recognized and declared that a party's failure to exclude from arbitrability contract disputes arising after termination of the collective bargaining agreement affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship.

The majority decision of the Eighth Circuit Court of Appeals, which had been the minority decision of the

original panel decision of the Eighth Circuit on this case, clearly is contrary to this precedent because the Court below misapplied the applicable precedent of this Court denying Petitioner and a former employee of the Employer herein the opportunity to have his discharge reviewed as to whether or not just cause existed for the same and whether it violated rights guaranteed by the collective bargaining agreement, collective bargaining relationship and federal labor law. This Court should vacate the judgment below and direct that the grievance of Mr. Ottoway be submitted to the grievance process consistent with the precedent set by this Court.

It is respectfully submitted that the Court should grant this Petition for Writ of Certiorari on the question presented.

Respectfully submitted,

/s/ Neil A. Barrick
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Attorney for Petitioner

October 14, 1986

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION 238,	)	
Plaintiff,	)	NO. C 84-21
vs.	)	ORDER
C.R.S.T., INC. [sic],	)	
Defendant.	)	

This matter is before the court on defendant's resisted motion for summary judgment, filed September 10, 1984. Defendant's request for oral hearing is denied and the motion is heard on the existing record. Granted.

Plaintiff, Chauffeurs, Teamsters and Helpers, Local Union 238, brought this action in the District Court of the State of Iowa in and for Linn County seeking an order of specific performance compelling defendant, C.R.S.T., Inc. (CRST), to submit a grievance to procedures found in a collective bargaining agreement between the parties. The action was removed to this court in accordance with 28 USC § 1441.

The parties' collective bargaining agreement expired on June 30, 1982. On December 23, 1982, after the parties collectively bargained to impasse, defendant unilaterally

implemented a schedule of wages, hours and conditions.[1] Jerry Ottaway was terminated from his employment with defendant on July 20, 1983 and plaintiff filed a grievance concerning the termination.

Defendant moves for summary judgment arguing that no collective bargaining agreement was in effect at any pertinent time and that it was not required to grieve the termination. Plaintiff argues that section 2 of CRST's December 23, 1982 schedule provided a grievance procedure.[2]

Summary judgment should not be entered unless the record indicates that there is no "genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FRCP 56(c). It is a procedure which advances the salutary objective of avoiding useless, expensive and time-consuming trials where there is actually no genuine, factual issue remaining to be tried. *Anderson v. Viking Pump,* 545 F.2d 1127, 1129 (8th Cir. 1979). Once a motion for summary judgment has been made and properly supported, the party opposing summary judgment may not rest upon the mere allegations or denials of his pleadings but his response, by affidavits or otherwise, must set forth specific facts showing that there

---

[1]Section 2 of the schedule provides in part:

> A list of employees arranged in the order of their seniority shall be posted in a conspicuous place at their place of employment. . . .
>
> Protest to any employee seniority date or position on the list must be made in writing (30) calendar days after such seniority date or position first appears, and if no protests are timely made, the dates and positions posted shall be deemed correct. Any such protest which is timely made may be submitted to the grievance procedure.

[2]Plaintiff has failed to provide a statement of material facts in dispute as required by Local Rule 2.2.7.

is a genuine issue for trial. *Burst v. Adolph Coors Co.*, 650 F.2d 930, 932 (8th Cir. 1981). Where the moving party establishes the absence of any genuine issue of material fact and the opposing party submits no evidence in rebuttal, summary judgment is justified. *Stovall v. City of St. Louis*, 614 F.2d 619, 621 (8th Cir. 1980).

Both parties agree that the prior collective bargaining agreement expired on June 30, 1982. The agreement was not extended by defendant's implementation of its December 23, 1982 schedule nor should an extension be implied. *See Baker v. Fleet Maintenance, Inc.*, 409 F.2d 551, 554 (7th Cir. 1969). Plaintiff and defendant did not enter into any agreement after the collective bargaining agreement expired and defendant, by the implementation of its schedule, did not manifest its intent to be bound by any other agreement. *See O'Connor Co., Inc. v. Carpenters Local Union No. 1408*, 702 F.2d 824, 825-26 (9th Cir. 1983).

Even if defendant's schedule is considered a contract, it does not provide procedures for grieving an employee discharge. The only grievable matters, under the schedule, are seniority dates and positions on the seniority list. Plaintiff was clearly attempting to grieve Ottaway's discharge, not his seniority date or position on the seniority list.

It is therefore

ORDERED

Granted.

January 31, 1985.

/s/ Edward J. McManus
Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT

Copy sent by certified mail on January 31, 1985 to: (w/judgment)

Neil A. Barrick
850 Ins. Exchange Building, Des Moines, IA 50309

Robert Konchar, Melvin Manning, Kevin Visser
P.O. Box 1943, C.R., IA 52406 w/B of C

/s/ [Illegible]
Deputy Clerk

APPENDIX B

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION 238,	Plaintiff	)	C 84-21
v		)	
C.R.S.T., INC. [sic],		)	
	Defendant.	)	

Edward J. McManus, Chief Judge

DECISION BY COURT. This action came to decision before the Court with the judge named above presiding. The issues have been decided and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff take nothing, that the action be dismissed, on the merits, and that the defendant, C.R.S.T., Inc. [sic] recover of the plaintiff, Chauffeurs, Teamsters and Helpers, Local Union 238, its costs of action.

/s/ Wm. J. Kanak
WILLIAM J. KANAK, Clerk

Jan. 31, 1985

FILED
CEDAR RAPIDS HDQTRS OFFICE
NORTHERN DISTRICT OF IOWA
JAN 31 1985
10:20 a
WILLIAM J. KANAK, Clerk
By: /s/ [Illegible]
Deputy

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 85-1301

Chauffeurs, Teamsters and Helpers, Local Union 238,	*	
Appellant,	*	Appeal from the United States District Court for the Northern District of Iowa.
v.	*	
C.R.S.T., Inc. (sic),	*	
Appellee.	*	

Submitted: September 10, 1985
Filed: December 30, 1985

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

LAY, Chief Judge.

Chauffeurs, Teamsters and Helpers, Local Union 238 (Union) brought suit in Iowa state district court seeking an order compelling CRST, Inc. (CRST) to submit a grievance filed by Jerry Ottaway, a CRST employee and Union member, to procedures set out in an expired collective bargaining agreement. Federal jurisdiction over this dispute exists pursuant to section 3401(a) of the Labor Manage-

ment Relations Act, 29 U.S.C. § 185(a) (1947). Upon removal to federal court pursuant to 28 U.S.C. § 1441 (1976), CRST moved for summary judgment, which the district court[1] granted. The Union appeals. We reverse and direct the district court to enter an order requiring CRST to submit the dispute to the grievance procedure.

From July 1, 1979 through June 30, 1982, CRST employed truck drivers under a collective bargaining agreement between it and the Union. The parties entered into negotiations prior to the contract's expiration, but were unable to agree on the new contract's terms. In December 1982, CRST notified its employees that an impasse had been reached and that it was unilaterally implementing a schedule of wages, hours and other terms and conditions of employment consistent with its final offer to the Union, effective December 27, 1982. The schedule contained no express grievance procedure. However, the schedule did provide:

> Section 2. Seniority List
>
> * * *
>
> Protest to any employee's seniority date or position on the list must be made in writing to the employer within thirty (30) calendar days after such seniority date or position first appears, and if no protests are timely made, the dates and positions posted shall be deemed correct. Any such protest which is timely made may be submitted to *the* grievance procedure. (our emphasis)

In July 1983, Jerry Ottaway, a truck driver, was discharged by CRST following an accident for which

[1]The Honorable Edward J. McManus, Senior United States District Judge for the Northern District of Iowa.

CRST determined he was responsible. He submitted a grievance, contending that he was discharged without just cause. The Union attempted to pursue the grievance to arbitration, following the grievance procedure prescribed in the expired agreement. CRST refused to arbitrate the grievance on the grounds that it had not agreed to be bound to any grievance or arbitration procedure other than as provided in its unilateral schedule for seniority purposes. The Union asserts that the existence of a grievance procedure may be inferred because CRST's unilateral schedule allowed for resolving seniority disputes through "the grievance procedure." Without the existence of some sort of grievance process, this language would be superfluous. Moreover, as no procedure had been settled on by the parties, the Union alleges that the procedure in the expired agreement remains in force. The Union also argues that the existence of a grievance procedure can be inferred because CRST represented that the unilateral schedule was consistent with CRST's final offer and that a grievance procedure was a part of this last offer.

In reviewing a district court's grant of summary judgment, this court applies the same standard as that used by the district court in granting the motion. *Mandel v. United States,* 719 F.2d 963, 965 (8th Cir. 1983). Summary judgment is proper only when there is no genuine issue of material fact so that the case may be decided as a matter of law, and on appeal the non-movant must be given the benefit of every favorable inference that may be drawn from the evidence. Fed. R. Civ. P. 56(c); *Buford v. Tremayne,* 747 F.2d 445, 447 (8th Cir. 1984). It is also well settled that the arbitrability of a particular labor dispute is a question of law for the courts to decide. *Brotherhood of Painters and Allied Trades of America, Glaziers & Glass Workers Local Union No. 558 v. Lord & Burnham Construction*

Corp., 705 F.2d 998, 999 (8th Cir. 1983). The Union has presented no affidavits contradicting the facts as established by CRST. The inferences drawn by the Union from those facts do not demonstrate a genuine issue of material evidentiary fact, but instead illuminate the ultimate legal issues to be resolved. Though the district court, therefore, properly proceeded to reach the case's merits, the question before us now is whether the district court erred in its resolution of the merits.

As a general rule, the duty to arbitrate is a creature of the collective bargaining agreement and a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so. *Nolde Brothers, Inc. v. Local No. 358, Bakery and Confectionery Workers Union, AFL-CIO,* 430 U.S. 243, 250 (1977). An employer may not be required to arbitrate a grievance that arises after the expiration of a collective bargaining agreement when the event complained of does not occur before the termination of the contract nor relates to any rights arising under the expired agreement. *See, e.g., O'Connor Co., Inc. v. Carpenters Union No. 1408 of the United Brotherhood of Carpenters & Joiners of America, AFL-CIO,* 702 F.2d 824, 825 (9th Cir. 1983); *Diamond Glass Corp. v. Glass Warehouse Workers and Paint Handlers Local Union 206,* 682 F.2d 301, 303-04 (2d Cir. 1982). Although it is clear that once impasse in negotiations has been reached, an employer has the right to unilaterallay institute terms and conditions of employment and in doing so is not bound to those contained in the expired agreement, courts have also recognized that an employer may act unilaterally after impasse only if its action is reasonably comprehended within its preimpasse bargaining proposals. *United Steelworkers of America, AFL-CIO v. Fort Pitt Steel Casting Division-Conval-Penn, Inc.,* 635 F.2d 1071, 1078 (3rd Cir. 1980)

(citing *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949)).

Federal labor policy favors arbitration as the method for resolving disputes related to collective bargaining agreements and there is a presumption that parties intend arbitration provisions to survive the expiration of agreements as to disputes which arise under a contract. *Nolde*, 430 U.S. at 254-55. *Nolde* involved an issue as to whether a dispute over severance pay was arbitrable after the expiration of a collective bargaining agreement. The Supreme Court found the dispute arbitrable on the grounds that it arose out of the terms of the expired contract. The Supreme Court further observed in *Nolde* that

> in the absence of some contrary indication, there are strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract. * * * While the termination of the collective-bargaining agreement works an obvious change in the relationship between employer and union it would have little impact on many of the considerations behind their decision to resolve their contractual differences through arbitration.

Nolde, 430 U.S. at 253-54.

Despite the employer's recognized right to act unilaterally after impasse, it is equally clear that the employment relationships which arise under a contract do not exist separate from it in a vacuum totally void of other relevant circumstances but continue even after the contract's termination. *Richardson v. Communication Workers of America*, 443 F.2d 974, 978 (8th Cir. 1971), *cert. denied*, 414 U.S. 818 (1973). This court emphasized in *Richardson* that

> the collective bargaining agreement is not an ordinary contract but rather, in a sense, agglomerates a variety of rights and methodology relating to the employer, the union, and the employees.
>
> * * *
>
> The expiration date of a bargaining contract does not place the employee in jeopardy of losing his job at the termination of the agreement. In fact one of the very incentives to union representation is job security. The employee, the union which represents him, the company which employs him, each contemplate [sic] a "subsisting" contractual relationship for an indefinite period of time. Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958). Note, 61 Column. L. Rev. 1363 (1961) [sic].
>
> * * *
>
> The collective bargaining agreement in addition recognizes seniority rights, which * * * affect vacation pay, severance pay, pension rights and the expectancy not to be laid off during slack periods of work. It has been recognized that many of these rights may survive the termination of the agreement.

Richardson, 443 F.2d at 978-79 (citations omitted). It may reasonably be argued that the dispute involved here, that Ottaway not be discharged without "just cause" as provided in the collective bargaining agreement, is as much a continuing right vested under the contract as was the right to severance pay in *Nolde*.

However, we need not decide whether the facts of *Nolde* are on all fours with this case and controlling here. We find an even more persuasive reason why Ottaway's dis-

charge should be submitted to the grievance process. The undisputed facts of the case at bar are distinguishable from cases which involve only the question of what terms and conditions survive an expired collective bargaining agreement after impasse. CRST here unilaterally implemented a schedule of terms and conditions of employment "consistent with its final offer" in which CRST included a reference to "*the* grievance procedure" (our emphasis). At issue here, then, is the meaning to be drawn from CRST's reference in its unilateral schedule to "the" grievance procedure.

In construing this unilaterally implemented term, we find instructive our reasoning in *Taft Broadcasting Co., WDAF AM-FM-TV v. NLRB*, 441 F.2d 1382 (8th Cir. 1971). In *Taft*, a draft collective bargaining agreement remained unsigned by the Union due to claimed discrepancies in the version presented to it for execution. The employer then sent a letter to the union advising that it intended to unilaterally implement wages, hours, and other terms and conditions of employment as set forth in the draft agreement, and would continue handling grievances that arose in the future in accordance with the procedure set forth in the draft. When the union later filed a grievance on behalf of an employee discharged after its unilateral imposition of working conditions, the employer refused to arbitrate on the grounds that the duty to arbitrate arises only out of a contract and that no executed contract between the employer and the union existed. This court disagreed, noting that the NLRB had found the employer's letter to be an interim agreement in which the ambiguous terms regarding arbitration were to be construed against the employer as the drafter of the agreement. *Taft*, 441 F.2d at 1384.

The district court in its memorandum order granting summary judgment to CRST did recognize that CRST's unilateral schedule could be seen to constitute a contract between CRST and the Union. However, in reaching its conclusion that the only grievable matters under the schedule are seniority dates and positions, the district court failed to apply the principle of judicial construction of labor contracts, articulated in *Taft*, that ambiguities in contract provisions are to be construed against the drafter, with all reasonable doubts as to interpretation resolved in favor of the other party. *See Taft*, 441 F.2d at 1384; *cf. Ross v. Royal Globe Insurance Co.*, 612 F.2d 379, 381 (8th Cir. 1980) (given possible conflicting interpretations of a contract provision, the district court should adopt the construction which most favors the party who had no part in preparing the contract).[2]

Whatever CRST's intent, the schedule's silence as to the submission of other issues besides seniority to the grievance procedure rendered the schedule ambiguous, and compels us to conclude that the schedule did not preempt Ottaway's discharge from being subject to a grievance procedure. *Cf. Johnson Controls, Inc. v. City of Cedar Rapids, Iowa*, 713 F.2d 370, 375 (8th Cir. 1983) (court's function in construing a contract is to determine the parties' intent from what is said and not from what they meant to say); *see also Minot Builders Supply Association v. Teamsters Local 123*, 703 F.2d 324, 327-28 (8th Cir. 1983) (discharge was arbitrable where collective bargain-

[2]This court has also stated, in the context of interpreting the terms of an ERISA plan, that "where one of the parties draws a contract and the other • • • cannot vary the terms, the burden is upon the party drawing the contract to make the meaning plain." *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1354 (8th Cir. 1980) (Citations omitted).

ing agreement did not state explicitly that discharges are not subject to arbitration; doubts regarding arbitrability should be resolved in favor of coverage). It seems clear from an analysis of CRST's reference to "the grievance procedure" in the unilateral schedule that CRST intended to retain a grievance procedure in its continuing relationship with the Union and the employees. The schedule nowhere expressly rejected the use of grievance procedures for issues other than seniority. As was persuasive in *Nolde,* the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship. *Nolde,* 430 U.S. at 255.

It should be borne in mind here that while the exact grievance and arbitration procedures proposed by the Union and CRST during contract negotiations differed, the inclusion of a grievance procedure in the final contract was itself never questioned.[3] As in *Taft,* CRST's unilateral schedule operates as an interim agreement retaining a grievance procedure for the resolution of disputes regarding terms and conditions of employment. We think that this is especially true in a situation where impasse has been reached and the employer has unilaterally instituted a set of wages, hours and other working conditions purportedly

[3]The record is replete with references to the grievance procedure proposals advanced by both parties during negotiations. For example, the August 31, 1984 affidavit of Lawrence B. Pollard, a Director of Industrial Relations for CRST during the period in question, states that "proposals by the company spelled out grievance machinery which only included final and binding arbitration. [The union proposed a different procedure.] Neither grievance procedure was the same as that contained in the expired collective bargaining contract."

consistent with a "final offer."[4] Notwithstanding CRST's claims to the contrary, we find that CRST's intent at the time it implemented the interim schedule was to continue using a grievance procedure for resolving disputes to the same extent contemplated by the expired contract.

CRST thus created a duty to submit disputes arising under the interim schedule regarding terms and conditions of employment to a grievance procedure by its representation that it was implementing working conditions consistent with its final offer to the Union. This conclusion is supported by CRST's failure to expressly exclude from the scope of the grievance procedure all issues except seniority. Our conclusion is further reinforced by the Supreme Court's observation that:

> [t]he contracting parties' confidence in the arbitration process and an arbitrator's presumed special competence in matters concerning bargaining agreements does not terminate with the contract. Nor would their interest in obtaining a prompt and inexpensive resolution of their disputes by an expert tribunal. Hence, there is little reason to construe this contract to mean that the parties intended their contractual duty to submit grievances and claims arising under the contract to terminate immediately on the termination of the contract; the alternative remedy of a lawsuit is the very remedy the arbitration clause was designed to avoid.

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[4]This court has previously noted that a grievance or arbitration procedure is a term or condition of employment, *NLRB v. Independent Stave Co., Diversified Industries Division*, 591 F.2d 443, 446 (8th Cir. 1979), *cert. denied*, 444 U.S. 829 (1979) (citing *Taft Broadcasting Co., WDAF AM-FM-TV v. NLRB*, 441 F.2d 1832 (8th Cir. 1971)).

Nolde, 430 U.S. at 254. CRST's reference in the schedule to a grievance procedure indicates that at the time CRST implemented the unilateral schedule, it contemplated that, for at least an interim period, employer-employee friction over working conditions would be resolved by a method of dispute resolution other than lawsuits.[5]

In view of our conclusion that the unilateral schedule's ambiguous terms should be construed against the drafter, we hold that the district court erred in finding that the schedule's grievance procedure clause applied only to seniority disputes.[6] Our construction, urged on this court by the Union, does not interfere with CRST's right to act unilaterally after bargaining has reached an impasse, but merely holds CRST to the reasonable meaning of an ambi-

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[5]Although the record is not complete, we note that the Union alleges in its complaint that CRST initially agreed to submit the dispute to the grievance procedure prescribed under the expired contract, which involved a hearing before the Iowa State Joint Area Committee at its monthly meeting in November, 1983. CRST and the Union appeared at that time, but prior to commencing the hearing CRST renounced its intent to submit to the grievance committee process on the grounds that the contract, and CRST's duty under the contract to process grievances, had expired.

[6]On December 5, 1985, a panel of this court decided *Garland Coal & Mining Co. v. United Mine Workers of America, et al.,* No 84-2465, (8th Cir. Dec. 5, 1985). The panel in *Garland,* relying on specific provisions of the collective bargaining agreement and the parties' bargaining history, affirmed the trial court's conclusion that only disputes based on events occurring while the expired contract was still in effect were arbitrable. However, the reasoning in *Garland* is inapposite to the facts presented before us now. In *Garland,* a bargained-for contract clause providing [sic] by clear implication that the parties did not intend that post-expiration grievances would be arbitrable. Here, no similar clause may be found in the parties' expired contract. In addition, in *Garland* there existed no post-impasse unilateral employer schedule which continued or reimplemented a post-expiration grievance procedure as is the case here.

guous term it chose to incorporate in its unilateral schedule.

The grant of summary judgment on behalf of CRST is reversed and the district court is instructed to enter judgment for the Union requiring the dispute to be submitted to the grievance process.

HENLEY, Senior Circuit Judge, concurring and dissenting.

I concur with the court's finding that there is no genuine issue of material evidentiary fact and that the case is a proper one for summary judgment. However, I believe also that the district court properly resolved the merits of the case, and that its judgment should be affirmed.

Relying largely upon *Nolde Bros. v. Local No. 358, Bakery and Confectionery Workers Union,* 430 U.S. 243 (1977), and the alleged ambiguity of the language found in CRST's unilateral schedule of hours and wages, the court today finds a duty to arbitrate.

Heavy reliance is placed on the presumption stated in *Nolde* that parties to a labor contract intend arbitration provisions to survive the expiration of the agreement. However, very little in the facts here supports the use of this presumption. In the affidavits submitted with its motion for summary judgment, CRST established that: (1) there was no agreement between the parties as to how to handle grievances after the expiration of the collective bargaining agreement; (2) during the negotiations both sides proposed grievance procedures which were different from those in the expired agreement; (3) the December, 1982 schedule provided for a grievance procedure only in limited circumstances; and (4) CRST had rejected all attempts by the Union to arbitrate grievances.

Moreover, the majority's misplaced reliance on this presumption pays no more than lip service to the obverse rule of law that a party cannot be forced into arbitration in the absence of a contractual obligation. *Id.* at 250.

The facts do not appear to involve rights of an employee arising under the contract. Here is involved a dispute over whether Ottaway should have been discharged because the

company found he was responsible for an accident which occurred over a year after the termination of the basic agreement. In *Nolde* and other cases where a right to arbitration has been found after the expiration of an agreement, the grievance has involved rights which to some degree vested or accrued during the life of the contract, and merely ripened after termination. *See id.* at 249 (severance pay); *Glover Bottled Gas Corp. v. Local Union No. 282, International Brotherhood of Teamsters,* 711 F.2d 479, 482 (2d Cir. 1983) (discharge of employees arbitrable where all acts leading to discharge occurred before termination of contract); *Federated Metals Corp. v. United Steelworkers,* 648 F.2d 856, 861 (3d Cir.) (dealt with pension plan rights), *cert. denied,* 454 U.S. 1031 (1981); *United Steelworkers v. Fort Pitt Steel Casting Division-Conval-Penn, Inc.,* 635 F.2d 1071, 1075, 1079 (3d Cir. 1980) (dealt with severance pay, vacation pay, life insurance coverage, and pension plan rights), *cert. denied,* 451 U.S. 985 (1981); *cf. Teamsters Local Union 688 v. John J. Meier Co.,* 718 F.2d 286 (8th Cir. 1983) (employees entitled to vacation pay because eligibility requirements met before expiration of agreement).

The court here attempts to apply *Nolde* by stating that this dispute involves a continuing right, Ottaway's right not to be discharged without just cause. But the right to be discharged for just cause is dissimilar to severance pay and vacation pay. An employee cannot work towards it or accumulate it over time. It is strictly a creature of the employment contract and its life should not extend beyond contract expiration. *See County of Ottawa v. Jaklinski,* No. 73329 (Mich. Nov. 7, 1985).

Next, I would note that the passage of more than a year between the expiration of the contract and the employee's discharge further erodes confidence in using here any pre-

sumption of arbitrability. The Court in *Nolde* limited its holding by stating that "we need not speculate as to the arbitrability of post-termination contractual claims which, unlike the one presently before us, are not asserted within a reasonable time after the contract's expiration." *Nolde,* 430 U.S. at 255 n.8.

Under the majority's analysis it is difficult to comprehend any right which would not be a continuing right. This would give a much broader meaning to the words "arises *under* the contract," *id.* at 249, than I believe the *Nolde* Court ever intended.

I also believe the majority has erred in finding that CRST's unilateral schedule is ambiguous as to grievance procedures.

It is asserted that because CRST's unilateral schedule mentions a right to submit seniority disputes to arbitration, and is silent as to what other rights may be submitted, the schedule is ambiguous. I see no ambiguity whatever. Rather, this clear statement shows explicitly how far CRST intended arbitration to reach. If it had intended arbitration to reach further, it could have so stated.

Nor can I agree with the court that "[a]s in *Taft,* CRST's unilateral schedule operates as an interim agreement retaining a grievance procedure for the resolution of disputes." *See supra* at 8. The letter in *Taft Broadcasting Co. v. NLRB,* 441 F.2d 1382 (8th Cir. 1971), which was found to be an interim agreement stated "it is our intention to continue in effect the wages, hours, and other conditions of employment presently in effect as fully set forth in the draft of June 22, 1966, and we will continue handling any grievances that may arise in accordance with the procedure set forth therein." *Id.* at 1382. This distinguishes *Taft*

from the case at hand because here CRST's unilateral schedule does not broadly agree to arbitrate all controversies, but rather only disputes concerning seniority.

Finally, I take the majority to task for its attempt to distinguish *Garland Coal & Mining Co. v. United Mine Workers,* No. 84-2464 (8th Cir. Dec. 5, 1985), from this case. *See supra* at 10, n.6. The majority states that in *Garland* there was not a unilateral schedule "which continued or reimplemented a post-expiration grievance procedure as in the case here." *Id.* This type of analysis simply begs the question to be decided.

As indicated, I would affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 85-1301

Chauffeurs, Teamsters and Helpers, Local Union 238,	*	
Appellant,	*	Appeal from the United States District Court
v.	*	for the Northern District of Iowa.
C.R.S.T., Inc. (sic),	*	
Appellee.	*	

Submitted: May 13, 1986

Filed: July 16, 1986

Before LAY, Chief Judge, HEANEY, ROSS, HENLEY, Senior Circuit Judge, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN and MAGILL, Circuit Judges, en banc.

HENLEY, Senior Circuit Judge.

Chauffeurs, Teamsters and Helpers, Local Union 238 (Union) sued CRST, Inc. (CRST) in Iowa State District Court based on 29 U.S.C. § 185(a) because of its refusal to arbitrate a grievance filed by Jerry Ottaway, an employee and Union member. The case was removed by defendant's motion to the United States District Court for the Northern

District of Iowa[1] pursuant to 28 U.S.C. § 1441. CRST then filed a motion for summary judgment. The district court granted this motion finding that no collective bargaining agreement requiring arbitration was in existence when the discharge occurred.

On appeal, a panel of this court reversed. *Chauffeurs, Teamsters and Helpers, Local Union 238 v. C.R.S.T., Inc.*, 780 F.2d 379 (8th Cir. 1985). It determined that while summary judgment was proper because no genuine issue of fact remained, the district court erred in its resolution of the merits. *Id.* at 381. The panel found that a unilateral schedule of wages and hours implemented by CRST after an impasse had been reached contained ambiguous terms concerning grievance procedures, thereby demonstrating an intention to continue arbitrating grievances. *Id.* at 383-84. The district court was instructed to enter judgment for the Union and require Ottaway's grievance to be submitted to arbitration. *Id.* at 384.

CRST sought rehearing en banc, arguing that there is no duty to arbitrate because the events surrounding Ottaway's grievance occurred over a year after the expiration of the agreement, and that its unilateral schedule was limited in its wording and did not create an extension of any contractual duty to arbitrate a claim of wrongful discharge.

On rehearing en banc we now hold that the judgment of the district court should be affirmed.

From July 1, 1979 to June 30, 1982 CRST employed drivers under a collective bargaining agreement between it and the Union. The parties undertook to negotiate a new contract but were unable to agree on its terms. In December,

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[1]The Honorable Edward J. McManus, now United States Senior District Judge, Northern District of Iowa.

1982 CRST notified its employees that an impasse had been reached and that it was unilaterally implementing a schedule of wages, hours and working conditions consistent with its final offer to the Union.

In July, 1983 Ottaway was terminated by appellee following an accident for which CRST determined he was responsible. He claimed to have been discharged without just cause and then submitted a grievance to the Union which pursued the matter according to the procedures prescribed in the expired agreement. CRST, however, refused to arbitrate the grievance maintaining that no agreement containing such a requirement was in effect between the parties.

In the affidavits submitted with its motion for summary judgment, CRST established that: (1) there was no agreement between the parties as to how to handle grievances after the expiration of the collective bargaining agreement; (2) during the negotiations both sides proposed grievance procedures which were different from those in the expired agreement; (3) the December, 1982 schedule did not include a grievance procedure although it did provide for seniority disputes to be resolved through such a procedure; and (4) CRST had rejected all attempts by the Union to arbitrate grievances.

The Union's resistance to this motion did not include any affidavits contradicting these statements. Rather, in its reply appellant asserted that the existence of a grievance procedure could be inferred because CRST's unilateral schedule allowed for resolving seniority disputes in this manner and without a grievance procedure this language would be superfluous. Moreover, as no procedure had been settled upon the parties, the Union alleged that the procedures in the expired agreement remained in force.

On appeal, it is suggested that presence of a grievance procedure can be inferred because CRST's unilateral schedule of wages was consistent with the Company's final offer, and it can be assumed that a grievance procedure was a part of the last offer.

We have been tempted to consider the question whether the grievance procedure in the Company's final offer would be an appropriate method of resolving Ottaway's dispute. However, at oral argument we were assured that no such issue was raised before the district court, that the record does not disclose what the procedure is,[2] and that resort to such procedure was not to be considered an issue before this court. Accordingly, we shall not dwell upon it further. We are left then with the question whether the grievance procedure of the expired contract applied to Ottaway's discharge.

In determining whether summary judgment should issue, the facts and inferences from these facts are viewed in a light most favorable to the non-moving party and the burden is placed on the moving party to establish that no genuine issue as to a material fact remains and that the case may be decided as a matter of law. Fed. R. Civ. P. 56(c); *Fields v. Gander,* 734 F.2d 1313, 1314 (8th Cir. 1984); *Shearer v. Homestake Mining Co.,* 727 F.2d 707, 709 (8th Cir. 1984); *Snyder v. United States,* 717 F.2d 1193, 1195 (8th Cir. 1983). However, once the moving party has met this burden, the non-moving party may not rest on the allegations in its pleadings but by affidavit and other evidence must set forth specific facts showing that a genuine issue of fact remains. Fed. R. Civ. P. 56(e); *Bu-*

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[2]We know that there was a dispute over grievance and arbitration procedures to be included in a new contract and that such dispute had not been resolved when impasse in negotiations was reached.

ford v. Tremayne, 747 F.2d 445, 447 (8th Cir. 1984); *Bouta v. American Federation of State, County & Municipal Employees,* 746 F.2d 453, 454 (8th Cir. 1984), *cert. denied,* 105 S.Ct. 1764 (1985).

Appellant has not set forth any evidence which would contradict the facts as established by CRST. The inferences the Union seeks to raise do not in our view demonstrate a genuine issue of evidentiary fact, but rather point up the ultimate issues which must be resolved in interpreting the agreements and actions of the parties. Therefore, the district court properly decided this case as a matter of law.

This case deals with two somewhat conflicting principles. One is the proposition that the duty to arbitrate a dispute must arise from a contract and no one may be forced to arbitrate outside of an express agreement to do so. *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582 (1960). The other is the federal labor policy which favors settling disputes through arbitration. *Id.* at 582-83.

These policies were dealt with in *Nolde Bros. v. Local 358, Bakery and Confectionery Workers Union,* 430 U.S. 243, 255 (1977), where the Court held that the right to arbitrate a severance pay dispute survived the expiration of the collective bargaining agrement. In *Nolde* the agreement expired while negotiations were ongoing. Approximately one month later the Union served notice that it was cancelling the agreement. Four days after the termination of the contract Nolde closed its plant and refused to give the severance pay required in the collective bargaining agreement. The Court found that the dispute, "although arising *after* the expiration of the collective-bargaining contract, clearly arises *under* that contract." *Id.* at 249

(emphasis in the original). It also stated the presumption that arbitration provisions are intended to survive the expiration of collective bargaining agreements. *Id.* at 255. This is based on the policy favoring arbitration and the rationale that the arguments in support of arbitration do not end with the agreement. *Id.* In order for this presumption to be terminated it "must be negated expressly or by clear implication." *Id.*

A panel of this court has recently had an opportunity to interpret *Nolde* in *Garland Coal & Mining Co. v. United Mine Workers,* 778 F.2d 1297, 1301 (8th Cir. 1985). There, focusing on the presumption of arbitrability, we found that it had been negated by clear implication based on the contract language and acts of the parties. *Id.* This focus is inappropriate here, however, because while the parties in *Garland* did not dispute that the grievances arose under the expired agreement, *id.* at 1301 n.7, here CRST vehemently contests this issue. Therefore, before we limit our examination to the *Nolde* presumption, we must first determine whether the disputed right arose under the collective bargaining agreement. *See International Brotherhood of Electrical Workers v. Nanco Electric, Inc.,* No. 85-2019, slip op. at 4 (8th Cir. May 9, 1986) (per curiam).

How to apply the narrow holding of *Nolde* and its broad presumption has created some confusion among courts in determining the arbitrability of post-expiration grievances. *See County of Ottawa v. Jaklinski,* 423 Mich. 1, 377 N.W.2d 668, 674-75 (1985). However, all of the courts appear to require that for a right to arbitration to exist the grievance must either involve rights which to some degree have vested or accrued during the life of the contract and merely ripened after termination, or relate to events which have occurred at least in part while the agreement was still in effect. *See Glover Bottled Gas Corp. v. Local Union*

No. 282, International Brotherhood of Teamsters, 711 F.2d 479, 482 (2d Cir. 1983) (discharge of employees arbitrable where all acts leading to discharge occurred before termination of contract); *O'Connor Co. v. Carpenters Local Union No. 1408,* 702 F.2d 824, 825 (9th Cir. 1983) (use of nonunion employees on job site after termination of contract is not arbitrable);[3] *Diamond Glass Corp. v. Glass Warehouse Workers and Paint Handlers Local Union 206,* 682 F.2d 301, 303-04 (2d Cir. 1982) (arbitration not required where union failed to state facts showing dispute related to rights arising from contract); *Federated Metals Corp. v. United Steelworkers,* 648 F.2d 856, 861 (3d Cir.) (dealt with pension plan rights), *cert. denied,* 454 U.S. 1031 (1981); *United Steelworkers v. Fort Pitt Steel Casting Division-Conval-Penn, Inc.,* 635 F.2d 1071, 1075, 1079 (3d Cir. 1980) (dealt with severance pay, vacation pay, life insurance coverage and pension plan rights), *cert. denied,* 451 U.S. 985 (1981); *cf. Teamsters Local Union 688 v. John J. Meier Co.,* 718 F.2d 286 (8th Cir. 1983) (employees entitled to vacation pay because eligibility requirements met before expiration of agreement).

The disputed right here, the right to be discharged for just cause, is dissimilar to the rights found arbitrable above such as severance pay and vacation pay, because it

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[3] *O'Connor* could be seen to be limited by *George Day Constr. v. United Bhd. of Carpenters and Joiners,* 722 F.2d 1471 (9th Cir. 1984), which found a duty to arbitrate a grievance (use of nonunion subcontractors on two job sites) where the dispute arose after expiration of the collective bargaining agreement but before an impasse was reached. *George Day* can be distinguished, however, because there the court held that the employer, by arguing its position in front of an arbitrator before filing suit, had impliedly consented to the arbitrator deciding both the arbitrability question and the merits of the case. *Id.* at 1475.

cannot be worked towards or accumulated over time. *See Jaklinski,* 423 Mich. at ____, 377 N.W.2d at 679. Rather, it is strictly a creature of the collective bargaining agreement and its life as a matter of contract does not extend beyond contract expiration.

Also, the facts here do not reveal any events which occurred prior to contract termination. The accident which resulted in Ottaway's discharge occurred after the termination of the agreement and nothing relates the dispute back to events which occurred during the time of the contract.

We conclude that the right involved here did not arise under the contract, thereby making the *Nolde* presumption inapplicable.

Moreover, the passage of more than one year between the expiration of the contract and the employee's discharge also makes application of the *Nolde* presumption of doubtful propriety. The Court in *Nolde* limited its holding by stating that "we need not speculate as to the arbitrability of post-termination contractual claims which, unlike the one presently before us, are not asserted within a reasonable time after the contract's expiration." *Nolde,* 430 U.S. at 255 n.8. To find that this grievance "arises under the contract," *id.* at 249, would give these words a much broader meaning than we believe the *Nolde* Court ever intended. This interpretation "would mean that parties to a collective-bargaining agreement would be presumed to intend that any dispute arising between them years or even decades after the expiration of the agreement would be arbitrable." *Local 703, International Brotherhood of Teamsters v. Kennicott,* 771 F.2d 300, 303 (7th Cir. 1985).

We also believe a duty to arbitrate the present dispute under the old contract machinery cannot be found from

CRST's unilateral schedule of wages and hours. The schedule's mention of a grievance procedure to determine seniority rights cannot be interpreted as allowing for arbitration of all disputes, but rather should be read as a clear statement showing explicitly how far CRST intended arbitration to reach. If CRST had intended arbitration to reach further, it would have so stated in the schedule.

In support of its position the Union refers to *Taft Broadcasting Co. v. NLRB,* 441 F.2d 1382 (8th Cir. 1971). In *Taft,* after the termination of a prior agreement, the employer sent the union a letter stating that the terms of employment, including grievance procedures, as set out in a draft agreement would be in effect until the union had an opportunity to negotiate any changes. *Id.* at 1383-84. In that case we held that this letter gave rise to an interim agreement to arbitrate grievances. *Id.* at 1385. No such interim agreement can be found here, however, as CRST's unilateral schedule does not broadly agree to arbitrate all controversies but rather only disputes concerning seniority.

As the disputed right did not arise under the expired agreement or occur within a reasonable time after its termination, and because CRST's unilateral schedule does not allow for grievance procedures except in the limited circumstances involving seniority rights, we conclude that Ottaway's discharge is not arbitrable.

Accordingly, the judgment of the district court is affirmed.

LAY, Chief Judge, dissenting, with whom **HEANEY**, Circuit Judge, concurs.

I dissent.

I.

Although I agree that once impasse in negotiations has been reached, an employer has the right to unilaterally institute terms and conditions of employment and in doing so is not bound to those contained in the expired agreement, the majority's analysis completely ignores the principle that an employer may act unilaterally after impasse only if its action is reasonably comprehended within its preimpasse bargaining proposals. *United Steelworkers of America, AFL-CIO v. Fort Pitt Steel Casting Division-Conval-Penn, Inc.*, 635 F.2d 1071, 1078 (3rd Cir. 1980) (citing *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949)).

Despite an employer's right to act unilaterally after impasse, it is clear that the working conditions which have characterized an employment relationship does not cease to exist on the date a collective bargaining agreement terminates. This court emphasized in *Richardson v. Communication Workers of America*, 443 F.2d 974, 978 (8th Cir. 1971), *cert. denied*, 414 U.S. 818 (1973), that

> the collective bargaining agreement is not an ordinary contract but rather, in a sense, agglomerates a variety of rights and methodology relating to the employer, the union, and the employees.
>
> * * *
>
> The expiration date of a bargaining contract does not place the employee in jeopardy of losing his job at the termination of the agreement. In fact

> one of the very incentives to union representation is job security. The employee, the union which represents him, the company which employs him, each contemplate [sic] a "subsisting" contractual relationship for an indefinite period of time. Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958). Note, 61 Column. L. Rev. 1363 (1961) [sic].
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> * * *
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> The collective bargaining agreement in addition recognizes seniority rights, which * * * affect vacation pay, severance pay, pension rights and the expectancy not to be laid off during slack periods of work. It has been recognized that many of these rights may survive the termination of the agreement.

Richardson, 443 F.2d at 978-79 (citations omitted). The dispute involved here, whether an employee may be discharged without "just cause," raises a continuing right vested under the contract as was the right to severance pay in *Nolde Brothers, Inc. v. Local No. 358, Bakery and Confectionary Workers Union, AFL-CIO*, 430 U.S. 243 (1977). To hold otherwise, as the majority does, relegates all employees upon termination of the collective bargaining agreement to a status of mere employment at will. No decision of which I am aware has ever suggested such a rule until now.

II.

However, there are even more persuasive reasons why this grievance should be submitted to grievance procedures. The undisputed facts of this case are distinguishable from cases which involve only the question of what terms and conditions survive an expired collective bargaining

agreement after impasse. Here, CRST unilaterally implemented a schedule of wages, hours, and other terms and conditions of employment "consistent with its final offer." Though the unilateral schedule described no detailed grievance procedure, the schedule did provide:

> Section 2. Seniority List
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> * * *
>
> Protest to any employee's seniority date or position on the list must be made in writing to the employer within thirty (30) calendar days after such seniority date or position first appears, and if no protests are timely made, the dates and positions posted shall be deemed correct. Any such protest which is timely made may be submitted to *the* grievance procedure. (our emphasis).

In construing "*the* grievance procedure," we find instructive our reasoning in *Taft Broadcasting Co., WDAF AM-FM-TV v. NLRB,* 441 F.2d 1382 (8th Cir. 1971). In *Taft,* a draft collective bargaining agreement remained unsigned by the Union due to claimed discrepancies in the version presented to it for execution. The employer then set a letter to the union advising that it intended to unilaterally implement wages, hours, and other terms and conditions of employment as set forth in the draft agreement, and would continue handling grievances that arose in the future in accordance with the procedure set forth in the draft. When the union later filed a grievance on behalf of an employee discharged after this unilateral imposition of working conditions, the employer refused to arbitrate on the grounds that the duty to arbitrate arises only out of a contract and that no executed contract between the employer and the union existed. This court disagreed, noting that the NLRB had found the employer's letter to be an in-

terim agreement in which the ambiguous terms regarding arbitration were to be construed against the employer as the drafter of the agreement. *Taft,* 441 F.2d at 1384.

The district court in its memorandum order granting summary judgment to CRST did recognize that CRST's unilateral schedule could be seen to constitute a contract between CRST and the Union., However, in reaching its conclusion that the only grievable matters under the schedule are seniority dates and positions the district court, now joined by the majority, failed to apply the principle of judicial construction of labor contracts as articulated in *Taft* that ambiguities in contract provisions are to be construed against the drafter, with all reasonable doubts as to interpretation resolved in favor of the other party. *See Taft,* 441 F.2d at 1384; *cf. Ross v. Royal Globe Insurance Co.*, 612 F.2d 379, 381 (8th Cir. 1980) (given possible conflicting interpretations of a contract provision, the district court should adopt the construction which most favors the party who had no part in preparing the contract).[1]

Whatever CRST's intent, the schedule's silence as to the submission of other issues besides seniority to the grievance procedure rendered the schedule ambiguous and compels the conclusion tht the unilateral schedule did not preempt Ottway's discharge from being subject to grievance procedures. *Cf. Johnson Controls, Inc. v. City of Cedar Rapids, Iowa,* 713 F.2d 370, 375 (8th Cir. 1983) (court's function in construing a contract is to determine the parties' intent from what is said and not from what they

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[1]This court has also stated, in the context of interpreting the terms of an ERISA plan, that "where one of the parties draws a contract and the other * * * cannot vary the terms, the burden is upon the party drawing the contract to make the meaning plain." *Landro v. Glendenning Motorways, Inc., 625 F.2d 1344, 1354 (8th Cir. 1980) (citations omitted).*

meant to say); *see also Minot Builders Supply Association v. Teamsters Local 123,* 703 F.2d 324, 327-28 (8th Cir. 1983) (discharge was arbitrable where collective bargaining agreement did not state explicitly that discharges are not subject to arbitration; doubts regarding arbitrability should be resolved in favor of coverage). It seems clear from CRST's own reference to "*the* grievance procedure" in the unilateral schedule that CRST intended to retain a grievance procedure in its continuing relationship with the Union and the employees. The schedule nowhere expressly rejected the use of grievance procedures for issues other than seniority. It should be borne in mind here that while the exact grievance and arbitration procedures proposed by the Union and CRST during contract negotiations differed, the inclusion of a grievance procedure in the final contract was itself never questioned. As in *Taft,* CRST's unilateral schedule operates as an interim agreement retaining a grievance procedure for the resolution of disputes regarding terms and conditions of employment. This is especially true in a situation where impasse has been reached and the employer has unilaterallay instituted a set of wages, hours and other working conditions purportedly consistent with a "final offer." This court has previously found that a grievance or arbitration procedure is a term or condition of employment, *NLRB v. Independent Stave Co., Diversified Industries Division,* 591 F.2d 443, 446 (8th Cir. 1979), *cert. denied,* 444 U.S. 829 (1979) (citing *Taft Broadcasting Co., WDAF AM-FM-TV v. NLRB,* 441 F.2d 1382 (8th Cir. 1971)).

The record is replete with references to the grievance procedure proposals advanced by both parties during negotiations. For example, the August 31, 1984 affidavit of Lawrence B. Pollard, a Director of Industrial Relations for CRST during the period in question, states that "pro-

posals by the company spelled out grievance machinery which only included final and binding arbitration. [The union proposed a different procedure.] Neither grievance procedure was the same as that contained in the expired collective bargaining contract." Undisputedly, CRST's offer was never limited to a grievance mechanism applicable only to seniority issues. Contrary to the history of bargaining between the parties, the majority approves implementation of a grievance procedure limited to arbitration only of seniority rights which was not only *not* comprehended within CRST's preimpasse bargaining proposals but totally contrary to the earlier collective bargaining agreement. This holding has no support in any case law of which I am aware; the majority cites no authority in support of its unprecedented analysis.

CRST plainly created a duty to submit disputes arising under the interim schedule regarding terms and conditions of employment to a grievance procedure by its representation that it was implementing working conditions consistent with its final offer to the Union. This conclusion is reinforced by the Supreme Court's observation that:

> [t]he contracting parties' confidence in the arbitration process and an arbitrator's presumed special competence in matters concerning bargaining agreements does not terminate with the contract. Nor would their interest in obtaining a prompt and inexpensive resolution of their disputes by an expert tribunal. Hence, there is little reason to construe this contract to mean that the parties intended their contractual duty to submit grievances and claims arising under the contract to terminate immediately on the termination of the contract; the alternative remedy of a lawsuit is the very remedy of the arbitration clause was designed to avoid.

Nolde, 430 U.S. at 254. CRST's reference to a grievance procedure indicates that at the time CRST implemented the unilateral schedule it contemplated that, for at least an interim period, employer-employee friction over working conditions would be resolved by a method of dispute resolution other than lawsuits.

This construction does not interfere with CRST's right to act unilaterally after bargaining has reached an impasse, but merely holds CRST to the reasonable meaning of an ambiguous term it chose to incorporate in its unilateral schedule. The majority's analysis glosses over the fact that CRST *did not* refer in its unilateral schedule to a grievance procedure applicable only to seniority, but to "*the*" grievance procedure, application of which outside of seniority disputes was ambiguous. Rather than being the "clear statement showing explicitly how far CRST intended arbitration to reach" which the majority describes, the unilateral schedule's language is precisely the sort which should be construed against CRST as the drafter. For the majority to revise CRST's imprecise drafting by rewriting the unilateral schedule to mean what CRST now wishes it said crosses the bounds of appropriate appellate review and is contrary to the principles of labor law previously articulated by both this court and the Supreme Court.

Judicial application of legal principles often results in philosophical disagreement with the decision which precedent requires; judicial officers nevertheless must strive to uniformly apply the law as it exists.

For the reasons set forth above, I dissent.

HEANEY, Circuit Judge, dissenting, with whom **LAY**, Chief Judge, concurs.

The majority opinion is well written and logical. The problem is that it ignores the facts and is inconsistent with Chief Justice Burger's opinion in *Nolde*.

The majority fails to note that prior to impasse CRST made a final offer which contained a proposed grievance and arbitration procedure and continued protection against discharge without just cause. When the union rejected the final offer, CRST informed its employees that an impasse had been reached in negotiations and that it intended to implement the final offer. It posted a notice stating: "Since negotiations have reached an impasse and the prior collective bargaining agreement has expired, the Company will place into effect wages, hours *and other working conditions* consistent with its final offer."[1] (Emphasis added.) ("December 23, 1982 Notice to All Over-The-Road Employees," by Lawrence B. Pollard, Director of Industrial Relations.)

Under these circumstances, as a matter of simple contract law, CRST remained obligated to continue in effect the grievance and arbitration procedure contained in its final offer. The company's statement unequivocally led its employees to believe that these critical protections would continue and that CRST's proposal was preferable to a

[1]CRST then distributed a schedule of wages and hours, which contained a reference to "the grievance procedure." The majority contends that this reference applies only to seniority disputes. however, it should be noted that the unilateral contract's provisions on employee discharges also are placed under the heading, "Loss of Seniority." Moreover, the schedule nowhere states or implies that there would no longer be a grievance procedure, or protection from discharge without cause.

strike. *See Richardson v. Communications Workers of America,* 443 F.2d 974, 978 (8th Cir. 1971), *cert. denied,* 414 U.S. 818 (1973) (So long as employees continue to be represented by a union, the working conditions which have characterized an employment relationship, including the right to protection from wrongful discharge, do not necessarily cease to exist on the date of contract expiration.). When its employees remained on the job, CRST's posted notice and final offer became a binding unilateral contract.

Even if this explicit language had not been contained in the company's final offer and its published statement that the conditions set forth in the final offer would prevail, the Supreme Court's opinion in *Nolde* would require a result different than that reached by the majority. As the Court stated:

> The parties must be deemed to have been conscious of this policy [of favoring arbitration of labor disputes] when they agree to resolve their contractual differences through arbitration. Consequently, the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate *all* grievances arising out of the contractual relationship. In short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication. [Emphasis added.]

430 U.S. at 255.

Here, although this principle was clearly established in

1976, the 1979 agreement between CRST and the union does not indicate expressly or by clear implication that grievances arising after termination will not be arbitrable. Nor is there any other evidence in the record which negates the *Nolde* presumption.

The majority reaches the conclusion that *Nolde* is inapplicable by adopting an oblique accrual theory which was advocated by the two dissenters in *Nolde* and rejected by the seven-justice majority. The dissent in *Nolde* argued that "the right in dispute, though claimed to arise under the contract, ripened only after the contract had expired and the employment relationship had terminated." 430 U.S. at 258. The majority stated that, "However, it is clear that, whatever the outcome, the resolution of that claim hinges on the interpretation ultimately given the contract clause providing for severance pay. The dispute, therefore, although arising *after* the expiration of the collective bargaining contract, clearly arises *under* that contract." *Id.* at 249. In other words, when the dispute concerns the interpretation to be given a provision of an expired agreement, the dispute arises under the contract and there is a strong presumption of continuing arbitrability.

Here, the dispute is over the wrongful discharge provisions of the expired collective bargaining agreement. Section three of CRST's unilaterally implemented employment contract, entitled "Loss of Seniority" states:

> SECTION 3. LOSS OF SENIORITY
>
> Seniority shall be terminated and the employer-employee relationship shall be severed by any of the following:
>
> 1. Discharge.
> 2. Voluntary quit.

3. Three (3) year layoff without regaining full-time status.

4. Unauthorized absence for three (3) successive scheduled work days.

5. Failure to make himself available for work at the end of ten (10) days after notice of recall is mailed to his last known address. A copy of the notice of recall shall be sent to the union.

6. Failure to obtain or comply with leave of absence provisions as set forth in this agreement.

7. Refusal to accept instructions given by a proper supervisor of the Company and/or to perform any work assignment unless it will affect his health or safety.

This section suggests that CRST's employees were still protected against discharge without cause as specified under the expired collective bargaining agreement, and CRST never contended in any of the documents in the record or at oral argument, that its employees are now "employees at will." Indeed, it only discharged Jerry Ottaway after determining, on its own accord, that he was guilty of "reckless driving." Recognizing the serious nature of this charge and its promise to continue protection against wrongful discharge, CRST, at one point, agreed to submit this dispute to arbitration, something totally unnecessary if it believed that it could discharge employees without cause and without submitting the dispute to arbitration.

The meaning, then, of "discharge" under the unilateral contract can only be determined by looking back to the 1979 collective bargaining agreement's provision on protection from discharge without cause or by looking at the wrongful discharge provisions of CRST's final offer. Indeed, one of CRST's briefs before the trial court states

that the underlying dispute is over whether "one of its [employees] was wrongfully discharged from his employment by CRST in violation of the terms of a collective bargaining agreement which had expired." Because, as the majority held in *Nolde,* "the resolution of that claim hinges on the interpretation ultimately given the contract clause [on discharge without cause], * * * [t]he dispute, * * * although arising *after* the expiration of the collective bargaining contract, clearly arises *under* that contract." *Id.*

Accordingly, the majority's theory is wrong on the facts and on the law. Most importantly, it fails to discuss how CRST's posted promise became a unilateral contract to abide by the grievance procedure. In any event, the Court should apply the *Nolde* presumption, and, once this is done, it becomes apparent that CRST did not meet its obligation to make clear that post-expiration grievances were no longer arbitrable. CRST could easily have added such a statement to its notice to its employees which alleged that "other working conditions" would continue in effect. However, it did not do so. Indeed, CRST did not make clear its intention not to abide by its "final offer" and its arbitration and wrongful discharge provisions until it decided to discharge Jerry Ottaway.

The majority opinion not only is contrary to *Nolde,* but it also allows CRST to be deceptive in its employment policies. Additionally, it skews our labor law policy of allowing the parties to settle their differneces on the economic battlefield, after their respective positions have been made clear. Finally, because the Ottaway wrongful discharge dispute will in any event be justiciable in federal district court under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, the majority opinion sim-

ply defers resolution of the dispute to a more costly, inconvenient, and time consuming forum.

WOLLMAN, Circuit Judge, dissenting.

I join in Part II of of Chief Judge Lay's dissent.

A true copy:

Attest:

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No. 86-609

Supreme Court, U.S.
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CLERK

In The
Supreme Court of the United States
October Term, 1986

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 238,

Petitioner,

v.

CRST, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WHETHER THE EIGHTH CIRCUIT CORRECTLY HELD THAT THE GRIEVANCE PROCEDURE OF A COLLECTIVE BARGAINING CONTRACT CANNOT BE RESURRECTED, AFTER IMPASSE, TO APPLY TO A DISCHARGE OCCURRING OVER ONE YEAR AFTER THE CONTRACT'S EXPIRATION.

PARTIES INVOLVED PURSUANT TO SUPREME COURT RULE 28.1

CRST, Inc.
CRST International, Inc.

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REASON FOR DENYING THE PETITION

THE EIGHTH CIRCUIT'S EN BANC DECISION IS CONSISTENT WITH THE OPINIONS OF ALL OTHER CIRCUIT COURTS OF APPEALS WHICH HAVE CORRECTLY APPLIED THIS COURT'S DECISION IN *NOLDE BROS. V. LOCAL 358.*

———o———

ARGUMENT

I. The Eighth Circuit properly held that the grievance machinery of an expired collective bargaining agreement could not be resurrected, after bargaining impasse, to provide arbitration for a complaint founded on a discharge which occurred over one year after the contract's expiration.

A.

The Eighth Circuit's limitation of post-termination arbitration to claims asserted within a reasonable time after contract expiration is consistent with *Nolde Bros. v. Local 358,* 430 U.S. 243 (1977) and the law of other circuits.

This Court in *Nolde Bros.* found no need to "speculate as to the arbitrability of post-termination contractual claims which, unlike the one presently before us, are not asserted within a reasonable time after the contract's expiration." *Nolde Bros. v. Local 358,* 430 U.S. at 255, note 8. The Eighth Circuit properly observed that to expand the *Nolde Bros.* holding beyond its stated limits:

> 'would mean that parties to a collective bargaining agreement would be presumed to intend that any dis-

> pute arising between them years or even decades after the expiration of the agreement would be arbitable.' *Chauffeurs, Teamsters, & Helpers Local No. 238 v. CRST*, 795 F.2d 1400, 1404 (1986) (App. D to Petition for Writ, page A-29), quoting from *Local 703 International Brotherhood of Teamsters v. Kennicott*, 771 F.2d 300, 303 (7th Cir. 1985).

The opinion of the Eighth Circuit is consistent with the recognized limits of *Nolde Bros.* from the standpoint of the need to assert a claim for arbitration within a "reasonable time" after the contract's expiration. Thirteen months after a collective bargaining contract has expired is not a reasonable time. In *Local 703, International Brotherhood of Teamsters v. Kennicott*, 771 F.2d 300 (7th Cir. 1985), the Seventh Circuit refused to allow the arbitration provisions of an expired collective bargaining agreement to govern a discharge occurring some six months after expiration. There, the court stated:

> Although it may be reasonable to presume that parties intend to arbitrate grievances arising shortly after the expiration of a contract, the presumption weakens as the time between expiration and grievance events increases. A contrary holding would mean that parties to a collective bargaining agreement would be presumed to intend that any dispute arising between them years or even decades after the expiration of the agreement would be arbitrable. We do not read the Nolde presumption of arbitrability to persist indefinitely after expiration. 771 F.2d 300, 303.

The lapse of time in the present case was even more pronounced as Ottaway's discharge for reckless driving occurred more than one year after the old collective bargaining agreement expired.

Any presumption in favor of arbitration must be tempered by the equally well recognized rule that only a party that contracts to arbitrate grievances is so bound. *Nolde Bros.*, 430 U.S. at 250-51. The parties here contracted to arbitrate disputes for a certain, set period of time. More than one year after the contract had been cancelled, and with no new agreement in place, the union sought arbitration over its member's reckless driving discharge. The event triggering this charge took place wholly after the date of contract expiration and cancellation. To hold that an arbitration procedure that was rejected by both the union and CRST in subsequent negotiations must remain in place is to render nugatory the agreement of the parties to allow their contract to expire on a date certain.

B.

The right to grieve discharges or any other matters is solely the creature of collective bargaining agreements. See, *Chauffeurs, Teamsters, & Helpers Local No. 238 v. CRST*, 795 F.2d at 1404. No "right arising *under* the contract" is here the subject of the attempted grievance.

In *Nolde Bros. v. Local 358*, 430 U.S. 243 (1977), certain severance rights had accrued under the earlier collective bargaining agreements. There, this Court affirmed the opinion of the Fourth Circuit that the severance pay claims which were asserted three days after the contract's cancellation were subject to arbitration. The *Nolde Bros.* decision was limited to the arbitration of such grievances as arise under the operation of an expired collective bargaining agreement. The severance pay in *Nolde Bros.*

was viewed by the Courts as deferred compensation, a sum to be vested in the employee by virtue of the continuing accrual throughout the duration of employment. *Nolde Bros. v. Local 358*, 430 U.S. at 248, n. 4.

Here, the union seems to argue that Ottaway is perpetually entitled to a "just cause" standard with respect to employment decisions despite the cancellation of the collective bargaining contract. There being no collective bargaining agreement in place between the parties, the claim to a collectively bargained standard of incompetency in the making of employment decisions is unavailable to the union.[1]

The employment relationship itself is not a right or relationship arising under a collective bargaining agreement, but rather exists independently of the collective bargaining process.

The *Nolde Bros.* theory that severance pay is akin to deferred compensation is inappropriate when applied to the right disputed here. "The disputed right here, the right to be discharged for just cause, is dissimilar to the rights found arbitrable above such as severance pay and vacation pay, because it cannot be worked towards or accumulated over time." *Chauffeurs, Teamsters, & Helpers Local 238 v. CRST*, 795 F.2d 1400, 1404, (8th Cir. 1986).[2]

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1 In fact, the lack of an agreement between the parties (as evidenced by the acknowledged "impasse") raises grave doubts as to whether jurisdiction for a § 301 suit exists. See, *A.T. Massey Coal Company, Inc., et al. v. International Union, United Mine Workers of America*, 799 F.2d 142 (4th Cir. 1986).

2 It is important to note that on rehearing en banc, not even a majority of the original Eighth Circuit panel supports the extreme position that the right to a "just cause" dismissal is a right arising under the old collective bargaining agreement. See, *Chauffeurs, Teamsters, & Helpers Local No. 238 v. CRST*, 795 F.2d 1400, 1410 (Partial Dissent of Judge Wollman).

The decisions of the federal Circuit Courts of Appeals have been consistent in interpreting the limited post-termination arbitration rights as set forth by this Court in *Nolde Bros.* See, *Garland Coal and Mining Company v. United Mine Workers*, 778 F.2d 1297 (8th Cir. 1985); *Local 703, International Brotherhood of Teamsters v. Kennicott*, 771 F.2d 300 (7th Cir. 1985); *O'Connor Company v. Carpenters Local Union No. 1408*, 702 F.2d 824 (9th Cir. 1983); *Diamond Glass Corporation v. Glass Warehouse Workers and Paint Handlers Local Union 206*, 682 F.2d 301 (2nd Cir. 1982).

II. Both parties expressly rejected the expired contract's grievance procedures; absent agreement to arbitrate, no such duty exists.

The union supplementally argues that CRST has somehow created an obligation to arbitrate post-expiration discharges by means of the implementation of unilateral terms and conditions of employment, after collective bargaining had reached impasse. (Petition for Writ, p. 6.) One fatal flaw in this argument is that the union, in its Complaint and throughout the District Court proceedings, sought to have the *old contract's* grievance procedure resurrected even though the agreement had been cancelled. Now, on Petition for Grant of Writ of Certiorari, the union for the first time seems to contend that CRST is contractually bound by some different discharge grievance procedure, instituted after impasse. The union's contention, raised here for the first time, is untimely. Order of Dist. Ct., p. A-1 (Appendix to Petition for Writ).

The union cannot seek arbitration pursuant to the old contract language because neither CRST nor the union

sought to continue with the expired grievance machinery after impasse. See, *Chauffeurs, Teamsters, & Helpers Local No. 238 v. CRST*, 795 F.2d 1400, 1402. In fact, during negotiations for a new contract, both CRST and the union proposed grievance machinery different from the old contract language. It would be unfair to both the union and CRST to impose upon them the obligation to arbitrate disputes where (1) both expressly rejected the old grievance language by seeking different language in their negotiations for a new contract and (2) CRST's unilateral proposal not only excluded all matters except seniority from arbitration, but also had its contract offer expressly rejected by the union, thereby establishing the exact opposite of a "contract," an impasse.

SUMMARY

This Court, in *Nolde Bros.*, recognized that some limits must be placed upon the continued arbitrability of post-termination grievances. The en banc opinion in the instant case merely brings into line the law of the Eighth Circuit with the consistent interpretation of *Nolde Bros.* as expressed by the opinions of all other Federal Circuit Courts of Appeals which have addressed the issue. No dispute or conflict as to the limitations exists and accordingly the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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